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Supreme Court, U.S.
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No. 03-1487

IN THE

Supreme Court of the United States

LISA FISHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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I. PETITIONER'S "HONEST SERVICES" FRAUD CONVICTION VIOLATES DUE PROCESS AND CONFLICTS WITH THE LAW OF OTHER CIRCUITS

Despite conceding that Petitioner's vagueness challenge must be "examined in light of the facts at hand" (Opp. 7), the United States' lengthy Brief in Opposition refuses to address the simple, uncontroverted facts submitted for the Court's review: an alleged violation of Florida conflict of interest statutes served as the sole and specific basis of Petitioner's indictment for "honest services" mail fraud under 18 U.S.C. § 1346. These Florida ethics statutes, which were quoted at length, cited, and explicitly relied upon by the grand jury in framing its "honest services" fraud charges, did not govern the conduct of Petitioner, who was not a state official. Nevertheless, Petitioner was charged by a federal grand jury with a federal crime solely because she allegedly assisted her co-defendant Lloyd Hasner - the part-time, volunteer chairman of the Palm Beach Housing Finance Authority ("HFA") - in violating specific Florida ethics statutes. Thus, a Florida ethics violation, which has no criminal penalties, was transformed by a federal grand jury into a crime under 18 U.S.C. § 1346. The federal fraud charges were maintained against Petitioner despite the grand jury's explicit acknowledgment that Chairman Hasner declared a personal conflict of interest and recused himself from voting on the one project in which he held an alleged financial interest.

Moreover, while acknowledging the split among the Courts of Appeals in their application of Section 1346, the United States attempts to diminish the conflict by asserting that Petitioner would have been convicted no matter which Circuit standard had been adopted. (Opp. 10-11). This position ignores the fundamental differences in standards utilized by the First, Second, and Fifth Circuits in evaluating "honest services" mail fraud. Not only are the standards remarkably divergent in the various Circuits - one requires proof of a state law violation in all cases, another requires proof of state law violation where state

statutes are listed in the Indictment, and still another requires proof of economic injury in all cases – but each separate standard, when applied to the facts of this case, would have indisputably required Petitioner's acquittal.

Beginning with its transparent alteration of Petitioner's "Questions Presented" (Pet. (i), Opp. (i)), the United States protests too much in characterizing this case as a run-of-the mill fraud prosecution that does not warrant this Court's review. Indeed, the United States' "head in the sand" approach underscores the unanswerable and fundamental flaw in the "honest services" charges framed by the grand jury against Petitioner: local, civil statutes with no criminal penalties have been used, without more, by federal prosecutors as the central foundation of federal mail fraud charges against Petitioner. With serious federalism concerns also attending Petitioner's mail fraud prosecution – no connection to interstate commerce was alleged by the grand jury or established at trial – the United States sought and received federal criminal penalties for state regulatory infractions. This dangerous cocktail of unconstitutional vagueness and federalism concerns sets Petitioner's case wholly apart from ordinary mail fraud prosecutions and represents a new outer limit in the reach of this overly broad statute.

A. Petitioner Had No Notice That Her Acts Would Lead to Federal Mail Fraud Prosecution

In its most blatant omission, the United States fails to address how the specific intent requirement of 18 U.S.C. § 1346 saves the statute as applied where the grand jury held Petitioner criminally responsible for assisting a public official's breach of local ethics statutes. (Opp. 8-9). The United States' proof at trial conclusively *negated* any inference that Petitioner possessed specific intent to defraud. Indeed, the evidence showed that Petitioner knew that Chairman Hasner declared a conflict on the project in which he had an alleged financial interest, was present when Hasner recused himself from voting on that project, and believed that Hasner's recusal satisfied any Florida conflict

requirements. (R19-327-43; R19-327-44). There is simply no record evidence, let alone sufficient evidence, that Petitioner had the specific intent to deprive the HFA of Hasner's "honest services" as Petitioner understood them under state law. Even assuming, *arguendo*, that Petitioner had intended to violate the Florida ethics statutes at issue, she could never have anticipated that her decision would have subjected her to *criminal* penalties in *federal* court.

Precedent cited by the United States that purportedly gave notice to Petitioner of a Section 1346 violation itself demonstrates that Petitioner had no notice that her conduct ran afoul of a federal criminal statute. (Opp. 8). In *United States v. Panarella*, 277 F.3d 678, 697 (3d Cir.), *cert. denied*, 537 U.S. 819 (2002), the principal case relied upon by the United States, the Third Circuit held that "if a public official fails to disclose a financial interest in violation of state criminal law and takes discretionary action that the official knows will directly benefit that interest, then the public official has committed honest services fraud." This case did not provide notice to Petitioner. Neither Petitioner nor her co-defendants' conduct violated state *criminal* law, nor did the grand jury so allege. In addition, co-defendant Hasner, the only public official involved herein, had no financial interest - direct or indirect - in the one matter alleged in the Indictment on which he voted, and he publicly recused himself from voting on the other project alleged in the Indictment in which he did have a financial interest. With neither element of the *Panarella* test present, neither Petitioner nor the world's most sophisticated criminal attorney could have guessed that her conduct violated the federal "honest services" fraud statute.[1]

The United States' remaining authority on this point (Opp. 8) is equally flawed and is so far removed from the

1. The conduct for which Petitioner was convicted took place in 1996, some *six years* before the decision in *Panarella*, the case most prominently cited by the United States to demonstrate that Petitioner was "on notice." This timeline itself completely refutes the United States' disingenuous contention that Petitioner knew she was committing a federal crime.

facts at hand that it only serves to emphasize Petitioner's complete lack of notice that a federal fraud prosecution could result where Chairman Hasner, the only public official involved, publicly recused himself and refused to vote on or otherwise influence any aspect of the one project in which he held an alleged financial interest. *See United States v. Woodward*, 149 F.3d 46, 62 (1st Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999) (public official *accepted secret gifts* from lobbyist in return for favorable votes, and *failed to report gifts* as required by state disclosure law); *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir.), *aff'd*, 602 F.2d 653 (1979) (en banc), *cert. denied*, 445 U.S. 961 (1980); (public official failed to disclose existence of *direct interest in a matter on which he voted*); *United States v. Keane*, 522 F.2d 534, 546 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (city councilman participated in official city council proceedings, without disclosure, and *passed judgment on matters in which he had a financial interest*).

B. The United States Does Not Dispute the Split of Authority Regarding "Honest Services"

The United States' Brief in Opposition concedes a split in the Circuits with regard to "the applicability of Section 1346 to conduct of the sort in which [Petitioner] engaged." (Opp. 10). Although Petitioner established that her conduct would not have resulted in an indictment had the district court followed any of the standards set forth by the First, Second, or Fifth Circuits in mail fraud cases (Pet. 12-18), the United States ignores the Circuit split by suggesting that Petitioner's conduct would have resulted in a conviction no matter which of the varying standards had been applied. (Opp. 10). This premise requires the United States to ignore the uncontroverted facts in this case, namely the specific inclusion and citation of Florida civil statutes in the Indictment as the basis of criminal "honest services" charges, as well as the United States' unsuccessful attempts to prove violation of the state statutes at trial.[2]

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2. The United States suggests that Petitioner's request for clarification of the scope of Section 1346 "appears logically inconsistent

(Cont'd)

With respect to the standard articulated by the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1028 (1997), which holds that a state official deprives his public employer of its right to his "honest services" *only* if the official acts or fails to act contrary to the requirements of his job under state law, the United States acknowledges the Circuit conflict but dismissively states that "the other court of appeals that have addressed the issue have held that proof of a violation of state law is not necessary to establish a violation of honest services." (Opp. 11). This position is simply incorrect. The Third Circuit recently considered a Section 1346 "honest services" charge and expressly "endorse[d] the decisions of other Courts of Appeals that have interpreted Section 1346 more stringently and required a state law limiting principle for 'honest services' mail fraud." *United States v. Murphy*, 323 F.3d 102, 104 (3d Cir. 2003) (citing to *Brumley*). Its misrepresentation of this point of law notwithstanding, the United States does not contest that the standard set forth by the Fifth Circuit in *Brumley*, and endorsed by the Third Circuit in *Murphy*, would have completely obviated Petitioner's conviction since no state law violation was proven. (Opp. 11).

The United States likewise does not dispute that the First Circuit's standard in *United States v. Sawyer*, 85 F.3d 713, 725-26 (1st Cir. 1996), which holds that the inclusion of state statutes in an "honest services" indictment requires the government to prove that a defendant violated at least one state law, would have precluded conviction here. (Opp. 12). Indeed, because Petitioner's Indictment included three Florida statutes – none of which the United States could prove were violated by Petitioner or her co-defendants –

(Cont'd)
with petitioner's contention that the statute is fatally, unconstitutionally vague." (Opp. 10). This represents yet another disingenuous characterization of Petitioner's argument by the United States. Petitioner seeks a ruling that Section 1346 is unconstitutionally vague *as applied to her*, and requests that the Court hold that the United States' use of an otherwise constitutional statute *on these specific facts* is unconstitutional.

the *Sawyer* standard would have required Petitioner's acquittal. Consequently, rather than address the First Circuit's holding in *Sawyer* directly, the United States again buries its head in the sand and argues that the grand jury's inclusion of the three Florida ethics statutes in the Indictment's "honest services" charges represented mere "surplusage." (Opp. 12).

While the United States now strains to ignore the fact that the grand jury specifically cited and quoted the civil statutes at length in framing charges pursuant to 18 U.S.C. § 1346 (*id.* at 8), its most disingenuous "oversight" is that the principal emphasis of the prosecution's case was whether one or more of these Florida statutes had been violated by Petitioner and her co-defendants. (R9-348-150; R15-352-130; R13-350-97-101). Only when it tried and failed to prove violation of one of the Florida civil statutes did the United States use the term "surplusage" to describe the Florida statutes that were the centerpiece of Petitioner's Indictment.[3]

Finally, the United States argues that the "honest services" standard utilized by the Second Circuit in *United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (en banc), *petition for cert. pending*, No. 03-1375 (filed March 29, 2004) would have resulted in petitioner's conviction since the concealment of Hasner's conflict of interest was capable of causing economic detriment to the HFA since it "potentially placed the bond issue in jeopardy." (Opp. 10-11). This assertion is incorrect in several obvious respects. As a threshold matter, Hasner's alleged financial interest in the

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3. The United States' claim that the Indictment focused on Hasner's "unjust enrichment" (Opp. 5) as opposed to the ethics statutes is patently false. Indeed, while the term "unjust enrichment" was mentioned in the Indictment, the ethics statutes were quoted verbatim, and references to Hasner's conflict under these statutes was repeated several times in the Indictment and by the United States during trial. Moreover, the "unjust enrichment" argument is completely inapposite because the district court entered a judgment of acquittal on the "money and property" theory of mail fraud as charged in the Indictment. (Pet. 33a). The United States did not appeal.

project on which he recused himself did not harm the project or the HFA in any way. Indeed, the undisputed testimony at trial showed that the HFA bonds were in no way jeopardized and the HFA actually *gained* financially because the housing project at issue turned into a beautiful success that continues to serve the public's needs (R11-305-117; R22-355-58). Moreover, there is no evidence that Petitioner, Chairman Hasner, or anyone else even *intended* to deprive the HFA of money. Indeed, neither the HFA, the public, nor the bondholders lost anything because of Hasner's receipt of a real estate commission after he recused himself from voting. The real estate commission would have automatically reverted to Petitioner, not the HFA, had Hasner not received it. (R17-310-270-71; MS-1). Accordingly, Hasner's conduct could not, and did not, cause the HFA any economic detriment and application of the standard adopted by the Second Circuit in *Rybicki* would have also required Petitioner's acquittal.[4]

C. The Differing Circuit Standards Require This Court's Urgent Review

The United States' additional basis for denying certiorari – that the Courts of Appeals "have uniformly reject vagueness challenges to Section 1346" (Opp. 9) – likewise rings hollow. As an initial matter, this case would not be the first time that this Court granted certiorari to correct the erroneous holdings of the "uniform" Circuits regarding "honest services" mail fraud. *See McNally v. United States*, 483 U.S. 350, 364 (1987) (holding that 18 U.S.C. § 1341 covered only property rights, despite all "federal courts that ha[d] confronted the question" having held that it also extended to intangible rights). *See also Kyllo v. United States*, 533 U.S. 27, 46 (2001) (holding that thermal imaging of

4. The Defendants in *Rybicki* submitted a petition for certiorari to this Court earlier this year and also request clarification of the scope of Section 1346. *See* No. 03-1375 (filed March 29, 2004). Because Petitioner's case involves both private citizens and public officials, as well as troubling federalism questions discussed below, it is at least as well-suited as *Rybicki* to allow for a comprehensive analysis by this Court regarding the appropriate scope of Section 1346.

suspect's home represented an unlawful search, even though "all the Courts of Appeals that have resolved the issue" held such searches were proper). Moreover, the Circuits' rejection of general vagueness challenges to Section 1346 is irrelevant here since Petitioner requests a ruling that the statute was unconstitutionally vague *as applied* to the specific allegations against her.

In any event, the Circuits' rejection of vagueness challenges to Section 1346 can hardly be described as unanimous. Indeed, both the Fifth Circuit in *Brumley* and the Second Circuit in *Rybicki* resolved their respective "honest services" cases in *en banc* proceedings that included vigorous dissents and, in *Rybicki*, a direct plea to this Court for clarification. *See Rybicki*, 354 F.3d at 156 (dissent stating that Section 1346 "flunks" the test for constitutional vagueness); *Brumley*, 116 F.3d at 742 (finding it "incomprehensible" for the majority to hold that Section 1346 reflects "a clear statement of a Congressional intention to protect the citizenry of a state from corrupt state officials"). *See also United States v. Handakas*, 286 F.3d 92, 104 (2d Cir.), *cert. denied*, 537 U.S. 892 (2002), *overruled in part*, *Rybicki*, 354 F.3d 124 ("If we were the first panel attempting to discern the meaning of the phrase 'honest services' in § 1346 we would likely find that part of the statute so vague as to be unconstitutional on its face"). Thus, far from a "settled" matter in the Circuits, vagueness concerns regarding Section 1346 remain prevalent. More importantly, none of the cases cited by the United States in support of its claim involved a federal criminal conviction explicitly based on violation of state ethics statutes.

The United States' remaining argument that denial of certiorari in *Rise v. United States*, No. 03-1088 (124 S. Ct. 2412) (2004) warrants denial of the instant petition is likewise misguided. *Rise* involved a lawyer's obvious breach of his fiduciary obligations by means of a sophisticated kickback scheme in which he bilked his clients of a large percentage of their case settlement proceeds. *See United States v. Hausmann*, 345 F.3d 952, 953 (7th Cir. 2003). These clients

suffered significant economic detriment as a result of defendants' undisclosed conduct, and the evidence at trial also demonstrated the scheme's significant connection to interstate commerce. *Id.* Petitioner's case is dramatically different in that there was *no* economic detriment to the alleged "victim" and *no* connection between the Petitioner's conduct and interstate commerce. Accordingly, it represents a much more compelling case for review than the obvious kickback fraud in *Rise*.

II. THE EXERCISE OF FEDERAL JURISDICTION IN THIS CASE VIOLATED THE COMMERCE CLAUSE AND THE TENTH AMENDMENT

In her opening brief, Petitioner established that the Eleventh Circuit improperly characterized the intrastate use of a private carrier as "category two" activity under the Commerce Clause test set forth by this Court in *United States v. Lopez*, 514 U.S. 549, 558 (1995). Category two governs statutes that directly "regulate or protect the actual instrumentalities of interstate commerce." Accordingly, because the mail fraud statute does not directly regulate or protect private carriers such as FedEx, *Lopez* category two was inappropriately invoked by the Eleventh Circuit here.[5] Had the Eleventh Circuit applied the test under either *Lopez* category one or three, the United States would not have met its burden to establish federal jurisdiction because there was neither evidence of a "use" of a channel of interstate commerce (required under *Lopez* category one) nor evidence that the wholly local activity substantially affected interstate commerce (required under *Lopez* category three).

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5. The United States argues that this Court's citation of category two cases in *Lopez*, all of which involved statutes that directly protected or regulated instrumentalities of interstate commerce, does not mean that *all* category two cases must directly protect or regulate such instrumentalities. (Opp. 14). However, in the only case since *Lopez* wherein this Court applied category two, it reiterated its holding in *Lopez* and applied category two to a statute that directly regulated and protected instrumentalities of interstate commerce. *See Pierce County, Washington v. Gullen*, 537 U.S. 129, 146-47 (2002) (holding that 23 U.S.C. § 409 was a proper exercise of Congress' commerce power under *Lopez* category two because it was aimed at "improving safety for the instrumentalities of interstate commerce").

The Commerce Clause cases cited by the United States (Opp. 14) are irrelevant because they do not address the mail fraud statute or statutes that contain language similar to the mail fraud statute. *See United States v. Marek*, 238 F.3d 310, 317 (5th Cir.) (en banc), *cert. denied*, 534 U.S. 813 (2001) (18 U.S.C. § 1958 requires "[u]se of interstate commerce facilities in the commission of murder-for-hire"); *United States v. Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999) (18 U.S.C. § 844 requires "use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce"); *United States v. Baker*, 82 F.3d 273, 275-76 (8th Cir.), *cert. denied*, 519 U.S. 1020 (1996) (18 U.S.C. § 1952 states "Whoever . . . uses . . . any facility in interstate or foreign commerce . . ."). In stark contrast to the mail fraud statute, the language of these purported category two statutes required that the facility in question, as well as the accompanying criminal conduct, have a direct link to interstate commerce. Accordingly, because the conduct at issue here lacked any connection whatsoever to interstate commerce – it concerned local actors, a local housing authority, local ethics statutes, and a local land deal – the United States' authority is wholly inapposite, and its prosecution of Petitioner exceeded the boundaries of Congress' authority under the Commerce Clause. *See generally United States v. Morrison*, 529 U.S. 598, 608 (2000) (quotation omitted) (recognizing Congress' commerce power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local").

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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